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Effects of armed conflicts on treaties

Note on draft article 5 and the annex to the draft articles

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A. Introduction

1. At the 2010 session of the International Law Commission, the Drafting Committee left open the issue of the list of categories of treaties that exhibit a very high likelihood of applicability on the basis of implication from their subject matter.[1] In the present note, the Special Rapporteur will make some observations and suggestions in this regard.

2. A number of solutions are possible in relation to the current version of article 5 and the annex to the draft articles. One solution, first advanced by the preceding Special Rapporteur, would be to incorporate the list into the draft articles as article 7.2. The list and the commentary thereto could also be placed at the end of the draft articles.[2] This was done in the 2008 version of the draft. A third solution would be to incorporate the list and the commentary thereto into article 5. Lastly, a fourth solution would be to include it as an annex to article 5.

3. Of these solutions, the last two are undeniably the most attractive and most realistic. The present Special Rapporteur tends to prefer the fourth solution, as indicated previously in his first report,[3] for several reasons. First, there is a significant body of practice on the subject, which is in itself a justification for taking account of it in some form other than an annex to the draft articles. Second, including the list as an annex to article 5 facilitates the implementation of this provision. The article highlights the criterion of the treaty's subject matter as potentially implying that it continues in operation, though without establishing an irreversible presumption; or, as stated in the memorandum by the Secretariat, the list encompasses the categories of treaties that exhibit a "very high likelihood of applicability".[4] This likelihood must be considered in detail, in part because the name of a treaty does not always correspond to its subject matter, meaning that treaties nominally belonging to one of the categories on the list may not in fact come under that heading; it is therefore preferable to describe the list as "indicative". In other cases, a treaty that does in fact meet the conditions for appearing on the list includes provisions that do not come under the category concerned and thus do not benefit from the likelihood implied by the list.

4. The solution recommended above is in the nature of a "compromise" in relation to the other possibilities. In the debates in the Commission's plenary meetings in 2010, it seemed to have garnered a substantial majority. This is another reason to prefer it, even though adjustments to the contents of the list and/or the commentaries thereto may be called for. A third reason is the one adduced by the present Special Rapporteur in his first report, namely that this solution offers a greater degree of normativity than if the list were consigned to the commentary to article 5.[5]

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[1] The effect of armed conflict on treaties: an examination of practice and doctrine. Memorandum by the Secretariat (A/CN.4/550), paras. 18-36.

[2] Third report on the effects of armed conflicts on treaties, by Mr. Ian Brownlie (A/CN.4/578), pp. 22-23.

[3] First report on the effects of armed conflicts on treaties (A/CN.4/627), paras. 52-70.

[4] Memorandum by the Secretariat (see footnote 1 above), para. 18.

[5] First report (see footnote 3 above), para. 64.

B. Difficulties inherent in the contents of the annex

5. In paragraph 3 of the present note, reference was made to the difficulty that may arise from the fact that a treaty's title may not correspond — or not correspond completely — to its subject matter. It goes without saying that the characterization of a treaty, i.e. the process of determining whether it may be classified in one particular category or another, must be done on the basis of the real subject matter of the treaty and its provisions. This process may well show that certain treaty provisions come under one of the categories appearing on the list, while other provisions do not come under any of them. This diversity may be accounted for, to some extent, by the separability of treaty provisions envisaged in article 10 of the draft articles.

6. Another difficulty is the fact that the draft articles aspire to regulate the effects on treaties of not only international but also internal armed conflicts. Some have criticized this ambition, asserting that the Commission should not have ventured into this territory or that it should have done so in a different way. This view, in turn, has prompted the objection that today the problems caused by non-international armed conflicts are much more significant than those arising from international armed conflicts and that it would be regrettable if the Commission were to ignore them. It is true, however, as noted by Graham, that "[t]he problem of the effect of a revolution [sic] on treaties ... has not received adequate discussion ... there remains a void in International Law in this respect".[6] Even if there were no legal void, contrary to Graham's statement, the practice in this area would in any case be sparse and difficult to identify. This being the case, there is no harm in extending the scope of the draft articles to situations of this type; but it must be understood that in so doing the Commission will be introducing into the draft articles a significant element of development, rather than codification, of international law.

7. The issue of the continued operation of treaties is sometimes considered without regard to whether it was in fact raised by an armed conflict, be it international or internal. This was the case, for example, when the Netherlands suspended all bilateral treaties during the turmoil in Suriname in 1982.[7] In *Oil Platforms*, the International Court of Justice found that the Treaty of Amity, Economic Relations, and Consular Rights of 15 August 1955 between the United States of America and Iran was still in force and could therefore serve as a basis for its jurisdiction,[8] but was there really an armed conflict between the two countries? In *Nicaragua* (1984), the Court considered that the Treaty of Friendship, Commerce and Navigation of 21 January 1956 between the United States and Nicaragua was still in force;[9] and this was confirmed by the fact that the United States subsequently denounced the Treaty under its terms.[10] But was there really an armed conflict between the two States? In many cases, it may thus be wondered which factor gave rise to the problem of an agreement's survival: was it in fact an armed conflict or, on the contrary, other grounds for termination or suspension (such as temporary or permanent impossibility of performance or a fundamental change of circumstances)?

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[6] A. Graham, "The Effects of Domestic Hostilities on Public and Private International Agreements: A Tentative Approach", *Western Ontario Law Review*, vol. 3, 1964, p. 128, cited from the memorandum by the Secretariat (see footnote 1 above), footnote 512.

[7] Memorandum by the Secretariat (see footnote 1 above), para. 90.

[8] *Ibid.*, paras. 70 and 71.

[9] *Ibid.*, para. 72.

[10] *Ibid.*, para. 72.

8. Another difficulty is that, according to traditional practice and doctrine, the issue was essentially whether a treaty (or parties to a treaty) continued in operation or became automatically invalid in case of international armed conflict. Today a treaty's lack of continuity may take two forms: abrogation or mere suspension, a far less dramatic consequence of the outbreak of armed conflict and one that facilitates a return to the status quo ante when the conflict has ended.

9. These questions, including the determination of the exact scope of existing doctrine and practice and of how their value should be assessed, are compounded by the question of how these elements have been presented; they have been based on doctrine and, with regard to practice, on that of English-speaking countries (Great Britain and the United States). Some Commission members have criticized this presentation and called on the Special Rapporteur to include supplementary elements, including judicial elements, and to ensure that this imbalance is removed from the commentaries to the relevant articles.

C. The way forward

10. In drafting the commentaries, the Special Rapporteur will heed this call as far as possible, in part by putting the role of doctrine in perspective. Doctrine is (or should be) only a reflection, systematization and synthesis of practice, but often it mainly reflects the personal opinions and preferences of its authors. At the same time, it is not possible to ignore doctrine completely, in view of the role it plays in the area dealt with by the draft articles.

11. With the help of the Secretariat and a number of colleagues, the Special Rapporteur will undertake supplementary research concerning, inter alia, the decisions of national jurisdictions so as to accentuate the draft articles' basis in jurisprudence. It should however be noted that the memorandum by the Secretariat, in particular, seems to be quite comprehensive, so that criticisms concerning the insufficiency of references to practice, particularly in case law, may be aimed more at the presentation than at the basis of the draft articles. At this stage of the work, the Special Rapporteur does not believe that the supplementary research to be undertaken will yield dramatic results. In any event, these results will be integrated into the commentaries to the articles to which they relate.

12. As to the different categories of treaties listed in the annex, the Special Rapporteur has no wish to make any changes except, possibly, to add treaties embodying rules of *jus cogens*. In his first report, he had nonetheless dismissed this idea, explaining that peremptory norms in a treaty

> "will survive in time of armed conflict, as will rules of *jus cogens* that are not embodied in treaty provisions; otherwise they would not be rules of *jus cogens*. Thus the inclusion of this category of treaties does not seem essential".[11]

13. What has just been said is undoubtedly still true: the proposed addition is not essential. But it would perhaps make it possible to spell out a point that is worth clarifying: that rules of *jus cogens*, whether treaty-based or customary, will survive anything, even armed conflicts. It should nonetheless be specified that as a general rule such treaties will contain, alongside peremptory norms, other provisions that will not necessarily continue in operation.

[11] First report (see footnote 3 above), para. 67